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Supreme Court, U.S.
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No. 99 168

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In the

OFFICE OF THE CLERK

Supreme Court of the United States

October Term, 1998

JON MCCLINTOCK; CHERRYHILL ASSOC. INC.,

Petitioners,

-v-

JOHN EICHELBERGER; BRAD COBER; ALEXA FULTZ; ROBERT WILL; JOHN EBERSOLE; SOUTHERN ALLEGHENIES PLANNING AND DEVELOPMENT COMMISSION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Whether a person who was denied a government contract in retaliation for exercise of his First Amendment rights of political speech and association is entitled to protection from such retaliation?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Petitioner, Cherryhill Associates, Inc., states that it has no parent companies or non-wholly owned subsidiaries.

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The decision of the United States Court of Appeals for the Third Circuit is set forth in the Appendix, p. 1a-20a and is reported at 169 F. 3d 812. A timely petition for rehearing was filed. The petition for rehearing was denied on April 27, 1999 and is set forth in the Appendix, p. 30a-31a. The Memorandum and Order of the United States District Court for the Western District of Pennsylvania is unreported, dated July 28, 1998 and set forth in the Appendix, p. 21a-29a.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254(1). The United States Court of Appeals for the Third Circuit entered judgment on March 24, 1999 and issued its denial of McClintock and Cherryhill's petition for rehearing on April 27, 1999. This Petition was timely filed within 90 days of the denial of the petition for rehearing, and is thus timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

First Amendment to the Constitution of the United States.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people to peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment to the Constitution of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

42 U.S.C. Section 1983.

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

At the outset, Petitioners stress the importance of the constitutional issue presented in this case. The issue in this case impacts not only the Petitioners, but because of the potential chilling effect on political speech and association, impacts thousands of individuals throughout the nation. Moreover, this case involves a constitutional issue that this Court has previously not addressed.

Petitioner Jon McClintock has been in the business of marketing and advertising for many years. He is the principal shareholder of Petitioner Cherryhill Associates Inc. Cherryhill is also in the business of marketing and advertising.

Respondent Southern Alleghenies Planning and Development Commission (hereinafter "Southern Alleghenies") is an entity established to develop the business and industry of six counties in Pennsylvania. Respondents Eichelberger, Cober, Fultz, Will and Ebersole were county commissioners of some of the six counties and as such were members of the executive board of Southern Alleghenies.

In 1997 Cherryhill was asked by Southern Alleghenies to submit a proposal for marketing services in connection with Southern Alleghenies TEAM PA initiative. After reviewing Cherryhill's proposal as well as four other proposals, Cherryhill and another firm were selected for interviews with the Finance Committee of Southern Alleghenies. The Finance Committee voted to award the contract to Cherryhill. The decision of the Finance Committee was forwarded to the Executive Committee of Southern Alleghenies. When the Executive Committee considered awarding the contract to Cherryhill, Eichelberger stated that he opposed awarding the

contract to Cherryhill because Cherryhill and McClintock had worked for and supported public officials and political candidates who were political opponents of Eichelberger. Thereafter, Eichelberger, Cober, Fultz, Will and Ebersole, who constituted a majority of the Executive Committee, voted not to award the contract to Cherryhill. These same individuals then voted to award the contract to another firm.

McClintock and Cherryhill filed a complaint which alleged that the actions of Southern Alleghenies and the individual members of the Executive Committee constituted an action under color of state law that violated McClintock and Cherryhill's First Amendment right to free speech and political expression.[1] Southern Alleghenies filed a motion to dismiss on the basis that, because Cherryhill was not terminated from an existing contract, there could be no cause of action. Subsequently, Petitioners filed an amended complaint, which alleged that Cherryhill had ongoing commercial dealings with Southern Alleghenies. Southern Alleghenies again filed a motion to dismiss. The District Court granted the motion to dismiss on the basis that Cherryhill was not terminated from an existing contract and as such was not entitled to protection from government retaliation.

Petitioners filed a notice of appeal to the United States Court of Appeals for the Third Circuit. Following oral argument a panel of the Court of Appeals affirmed the District Court by a 2-1 vote with Judge Roth dissenting.[2] A timely filed petition for rehearing was denied.

[1] Petitioners' complaint contained two counts. Count I raised the constitutional issue that is the subject of this writ. Count II was a pendent state claim, also dismissed by the District Court, which is not the subject of this Petition.

[2] The majority of the Court of Appeals determined that because the amended complaint asserted that Cherryhill was a regular provider of

Petitioners have filed a Petition for Writ of Certiorari based upon the issue and argument presented herein.

REASON FOR ISSUING THE WRIT

Whether a person can be denied a government contract based on the applicant's exercise of his First Amendment rights is an important constitutional question that has not been addressed by this Court.

This Court has long protected government employees from retaliation for the employees' exercise of their First Amendment rights of political speech and association. *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980). In *Elrod* and *Branti* the retaliation took the form of termination from government employment. This Court reasoned that conditioning public employment on supporting the political party in power "unquestionably inhibits protected belief and association." *Elrod* at 359.

Not only has this Court provided protection from government terminating an employee for exercise of First Amendment rights but also from government refusing to hire

services as that term was used in *Umberhr*, the court could not consider whether Petitioners were entitled to protection as an applicant for a new contract. Although it is true that Petitioners plead facts which they believed granted them the same status as the plaintiffs in *Umbehr* and *O'Hare*, the Amended Complaint also plead facts and causes of action which fairly encompass the assertion that Petitioners are entitled to protection from government retaliation regardless of whether they were a regular provider of service as the court contemplated that term in *Umbehr* or an applicant for a new contract. See Appendix, p. 32a. Judge Roth's stated in her dissent that "the issue, as I have set it out above is fairly before this court." See Appendix, p. 20a.

an applicant for government employment based on the applicant's exercise of his First Amendment rights. *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990). In so doing this Court stated, "[U] nder our sustained precedent, conditioning hiring decisions on political belief and association plainly constitute an unconstitutional condition...." *Id.*, at 78. Justice Brennan went on to state:

> If Moore's employment application was set aside because he chose not to support the Republican Party, as he asserts, then Moore's First Amendment rights have been violated. Therefore we find that Moore's complaint was improperly dismissed.

Id., at 78-79.

Most recently, in *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr*, 518 U.S. 668 (1996) and *O'Hare Truck Services, Inc. v. City of Northlake*, 518 U.S. 712 (1996), this Court held:

> The protections of *Elrod* and *Branti* extend to instances ... where government retaliates against a contractor or a regular provider of services, for the exercise of political association or expression of political allegiance.

O'Hare, 518 U.S. at 714-15. See also *Umbehr*, 518 U.S. at 673.

This Court extended the protections provided to government employees to actions involving independent contractors because it found no difference of "constitutional magnitude" between these two types of workers. In *Umbehr*, Justice O'Conner stated, "[I] ndependant contractors are similar in most relevant respects to government employees...."*Id.*, 518 U.S. at 684. Because of these similarities this Court looked to the government employee precedents "for guidance," *Umbehr*, 518 U.S. at 674, and "appl [ied] ... the existing framework for government employees cases to independent contractors." *Id.* at 677.

Although extending protection to individuals terminated from existing contracts, this Court in *Umbehr* and *O'Hare* specifically declined to address the issue presented in this case, namely whether an applicant for a government contract is provided with protection from government retaliation for the exercise of political speech and affiliation.[3] As stated by Justice O'Conner in *Umbehr*:

> Because Umbehr's suit concerns the termination of a preexisting commercial relationship with the government, we need not address the possibility of suits by bidders or applicants for new government contracts

[3] Both the District Court and the Court of Appeals pointed to the fact that Cherryhill was not terminated from an existing contract in finding that Cherryhill was not entitled to First Amendment protection.

> who cannot rely on such a relationship.

Umbehr, 518 U.S. at 685.

This case squarely presents this Court with the opportunity to provide guidance to courts and governments regarding whether an applicant for a government contract can be denied a contract solely as retaliation for the applicant's exercise of political speech and affiliation.

As stated above, in *Rutan*, this Court afforded protection to applicants for government employment. Because of this Court's holdings in *Rutan*, *Umbehr* and *O'Hare* and the reasoning used in reaching them, it is respectfully submitted that, an applicant for a government contract must be afforded the same First Amendment protections as an existing government contractor. To hold otherwise would not only undermine the reasoning this Court used in those cases, but would have a great chilling effect on political speech and association on prospective applicants for government contracts. If, for example, Contractor A has a contract to collect trash for a local government, he has protection against retaliation for the exercise of political speech and affiliation. Accordingly, Contractor A can oppose the party or politician in power without fear of retaliation. However, if Contractor B is interested in obtaining the same contract, she must always be worried about opposing the party or politicians in power because she could be denied the contract based on her political speech or affiliation. Accordingly, contractors who wish to receive government contracts must constantly be concerned about their political speech or association. However, contractors who currently have government contracts can freely express their political views without having to be concerned about

government retaliation. Such an incongruity must not be permitted.

Because of this incongruity this Court should grant this Petition and specifically state that an applicant for a government contract has the same protections as an applicant for government employment and as a contractor with an existing government contract.

CONCLUSION

In *Rutan* this Court held that an applicant for government employment cannot be denied a job based on the applicant's political speech or association. In *Umbehr* and *O'Hare* this Court determined that, when considering whether to provide independent contractors with protection from government retaliation, such contractors were similar to government employees. In so doing, this Court held that an independent contractor could not be terminated from an existing contract for exercise of First Amendment rights. Reading those cases together, logic dictates that an applicant for a government contract cannot be denied a contract based on the applicant's exercise of his rights of political speech and association.

The granting of this Petition provides the opportunity for this Court to address this important constitutional question that was left unanswered by *Umbehr* and *O'Hare*. Granting this Petition will clarify to courts and most importantly to government that a person cannot be punished by the denial of a government contract solely because that person does not support the party or politician in power.

and reverse the Third Circuit's dismissal of Count I of Petitioners' complaint.

Respectfully submitted,

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(Any footnotes trail end of each document)

No. 98-3443

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JON MCCLINTOCK; CHERRYHILL ASSOC. INC.,
Appellants

v.

JOHN EICHELBERGER; BRAD COBER; ALEXA FULTZ; ROBERT WILL; JOHN EBERSOLE; SOUTHERN ALLEGHENIES PLANNING AND DEVELOPMENT COMMISSION

March 24, 1999, Filed

COUNSEL: Daniel M. Berger, Paul A. Lagnese (argued), Berger Law Firm, Pittsburgh, PA, Attorneys for Appellants.

Robert L. McTiernan (argued), Tucker Arensberg, P.C., Pittsburgh, PA, Attorneys for Appellees.

JUDGES: BEFORE: GREENBERG, ROTH, and LOURIE, * Circuit Judges. Roth, Circuit Judge, Dissenting.

OPINIONBY: GREENBERG

OPINION: OPINION OF THE COURT

GREENBERG, Circuit Judge.

I. INTRODUCTION

This matter is before this court on an appeal from an order entered in the district court on July 28, 1998, granting the appellees' motion pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the first amended complaint in this case for failure to state a claim on which relief may be granted. The case arises principally under the First Amendment to the United States Constitution, applicable to the states through incorporation under the Fourteenth Amendment. See Gitlow v. New York, 268 U.S. 652, 666, 45 S. Ct. 625, 629, 69 L. Ed. 1138 (1925). In addition, appellants have set forth a supplemental state-law claim. We are concerned here with the First Amendment's impact on the awarding of a governmental contract. In view of the procedural posture of this case we accept the appellants' factual allegations as true and view them in the light most favorable to appellants. See Smith v. National Collegiate Athletic Ass'n, 139 F.3d 180, 183 (3d Cir. 1998), rev'd on other grounds, 119 S. Ct. 924 (1999).

Appellants, Jon McClintock and Cherryhill Associates, Inc., brought this action against appellees John Eichelberger, Jr., Brad Cober, Alexa Fultz, Robert Will, John Ebersole, and Southern Alleghenies Planning and Development Commission. Appellants assert that McClintock at all times relevant to this action was engaged in the business of marketing and advertising through Cherryhill, a Pennsylvania corporation, in which he is the principal shareholder. The individual appellees are commissioners of Blair, Somerset, and Huntington Counties, Pennsylvania, and as such are members of the Executive Board of the appellee, Southern Alleghenies Planning and Development Commission which,

according to the appellants, "is a corporation or other entity existing under the laws of the Commonwealth of Pennsylvania." Notwithstanding that imprecise characterization, it is undisputed that Southern Alleghenies is a public entity. Appellants allege that Southern Alleghenies at all times relevant "was engaged in developing the business and industries of the Counties of Bedford, Blair, Cambria, Somerset, Huntingdon and Fulton."

The complaint alleges that beginning in 1985 appellants and Southern Alleghenies "developed an ongoing business relationship . . . as independent contractors," meaning that appellants have been independent contractors engaged by Southern Alleghenies to perform services. In particular, the complaint alleges that in 1985 Southern Alleghenies retained McClintock to coordinate the promotion of its "Seatbelt Safety Demonstration Project" and in 1992 Southern Alleghenies retained Cherryhill "to coordinate providing promotional materials and advertising for the 1992 United States Olympic Cycle Trials which was coordinated by" Southern Alleghenies. Appellants allege that they performed their services to the satisfaction of Southern Alleghenies.

The final particularized allegation constituting this "ongoing business relationship" is that "in the years of 1995, 1996 and 1997, . . . Southern Alleghenies purchased various promotional materials from . . . Cherryhill such as magnets, vinyl banner and bags and specially imprinted 'Slinkies.'" It thus appears that the "ongoing business relationship" between appellants and Southern Alleghenies consisted of one contract in 1985 performed by McClintock as an independent contractor, one contract in 1992 performed by Cherryhill as an independent contractor, and a vendor-vendee relationship

between Cherryhill and Southern Alleghenies from 1995 through 1997 involving the sale of promotional materials.

The appellants next alleged that because of their "ongoing relationship" Southern Alleghenies requested Cherryhill "to submit a proposal . . . to perform marketing services in connection with [its] TEAM PA Initiative. The marketing campaign proposed by . . . Cherryhill was designed to make companies in the six county area aware of a survey process being conducted prior to interviewers contacting businesses to set up interview dates." Of course, appellants allege that Cherryhill's proposal provided for Southern Alleghenies to pay Cherryhill "for the services to be performed under the marketing contract."

Appellants allege that the TEAM PA Initiative was a "coordinated effort" between Southern Alleghenies and certain otherwise unidentified "Industrial Development Corporations." The Industrial Development Corporations reviewed Cherryhill's proposal as well as those from other firms and "unanimously agreed to award the marketing contract to . . . Cherryhill." Appellants allege that on May 21, 1997, the Finance Committee of Southern Alleghenies approved awarding the contract to Cherryhill following which the contract was presented to the Southern Alleghenies Executive Board for final approval.

Appellants allege that appellee "Eichelberger stated his opposition to awarding the contract to . . . Cherryhill because [appellants] had supported and performed services for public officials and political candidates who [Eichelberger] opposed." The other individual appellees agreed with Eichelberger. As a result of the vote of the five individual appellees "constituting a majority of the Executive Board" it

defeated a motion to award the contract to Cherryhill. The Executive Board by the same vote then awarded the contract to another concern. While the complaint is unclear on this point, we infer that the Executive Board must have more than five members and that some of the members favored awarding the contract to Cherryhill.

Appellants alleged that appellees did not award the contract to Cherryhill because appellants:

> in the exercise of their rights under the First and Fourteenth Amendments, had supported and performed services for various public officials and political candidates who were opposed by Defendant Eichelberger and some or all of the other individual Defendants, or, in the alternative, Defendant Eichelberger opposed said public officials and political candidates and the other individual Defendants supported Defendant Eichelberger in denying the marketing contract to Plaintiff Cherryhill, with said other individual Defendants knowing that Defendant Eichelberger's oppositions was based upon Plaintiffs' support of said public officials and political candidates.

Appellants alleged that by reason of their "long, ongoing and satisfactory business relationship" with Southern Alleghenies and the approval of their proposal by the Industrial Development Corporations "acting as the TEAM PA Advisory Committee" as well as by Southern Alleghenies' Finance Committee, they "had the expectation that the marketing contract would be awarded to . . . Cherryhill."

Thus, they alleged that the appellees acting under color of state law in violation of 42 U.S.C. § 1983 penalized them from exercising "their rights of free speech and assembly, as guaranteed by the First and Fourteenth Amendments . . . by supporting and working for public officials and political candidates of their choice." Appellants also asserted that the facts they alleged constituted the state-law tort of interference with "the advantageous relationship between . . . Cherryhill and . . . Southern Alleghenies." Appellants sought compensatory and punitive damages. The district court had jurisdiction over appellant's complaint under 28 U.S.C. §§ 1331, 1343(a), and 1367.

As we have indicated, the appellees moved to dismiss under Fed. R. Civ. P. 12(b)(6). The district court granted the motion in its memorandum and order of July 28, 1998. In its memorandum the district court set forth the background of the case and then indicated that in Elrod v. Burns, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976), "the Supreme Court recognized that a public employee who alleges that he was discharged or threatened with discharge solely because of his partisan political affiliation or nonaffiliation states a viable claim under [42 U.S.C.] § 1983 that his First Amendment rights have been violated." The district court then indicated that in Branti v. Finkel, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1987), the Supreme Court confirmed the Elrod holding that patronage dismissals are unconstitutional unless political affiliation is an appropriate requirement for the effective performance of the public office involved. The district court next said that in Rutan v. Republican Party of Illinois, 497 U.S. 62, 110 S. Ct. 2729, 111 L. Ed. 2d 52 (1990), the Supreme Court extended Elrod and Branti by holding that those cases applied "to promotion,

transfer, recall, and hiring decisions based on party affiliation and support." Id. at 79, 110 S. Ct. at 2739.

The district court then addressed two Supreme Court cases which, like this one, involved not employees, but independent contractors, Board of County Comm'rs v. Umbehr, 518 U.S. 668, 116 S. Ct. 2342, 135 L. Ed. 2d 843 (1996), and O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 116 S. Ct. 2353, 135 L. Ed. 2d 874 (1996). The district court pointed out that in Umbehr and O'Hare the Court held that a government may not terminate an independent contractor's relationship to retaliate against the contractor for the exercise of his rights to political allegiance or political association. The district court noted, however, that Umbehr and O'Hare involved situations in which there had been ongoing commercial relationships between the public entity and the independent contractor. In fact, Umbehr and O'Hare respectively involved trash hauling and motor vehicle towing, municipal services of an ongoing character.

The district court indicated that appellants were not in the same position as the plaintiffs in Umbehr and O'Hare as Cherryhill "was no more than a bidder or applicant for a new government contract." Moreover, the district court, in declining to find a sufficient allegation of a First Amendment violation in the complaint, made reference to the Supreme Court's caveat at the end of Umbehr:

> Finally, we emphasize the limited nature of our decision today. Because Umbehr's suit concerns the termination of a pre-existing commercial relationship with the government, we need not address the possibility of suits by bidders or applicants for new government

> contracts who cannot rely on such a relationship.

Umbehr, 518 U.S. at 685, 116 S. Ct. at 2352. The district court indicated that while the Supreme Court might extend the Elrod, Branti, and Rutan "jurisprudence to the claims of disappointed bidders and applicants," it would not do so.

The district court ended its opinion by dismissing appellants' state law claims. In this regard it pointed out that in Pennsylvania there cannot be a tortious interference with a contract unless three parties are involved, a tortfeaser, a plaintiff and a third party with whom the plaintiff is contracting. See Maier v. Maretti, 448 Pa. Super. 276, 671 A.2d 701, 707 (Pa. Super. 1995). Thus, the appellees could not be liable as the germane contract was with them. Furthermore, the result was not affected by reason of the fact that the individual appellees were officers or agents of Southern Alleghenies. See Daniel Adams Assocs., Inc. v. Rimbach Publ'g Co., 360 Pa. Super. 72, 519 A.2d 997, 1000-02 (Pa. Super. 1987). The district court then entered the order of July 28, 1998.

Appellants appeal from the order of July 28, 1998. We have jurisdiction under 28 U.S.C. § 1291 and exercise plenary review on this appeal. Thus, we can affirm only if we are certain that the appellants cannot prove any set of facts under the first amended complaint which would be the basis for relief. See Smith, 139 F.3d at 183.

II. DISCUSSION

Initially we identify the precise issue before this court. As we have indicated, the Supreme Court in Umbehr carefully

limited its opinion to holding that there was a First Amendment protection of pre-existing commercial relationships while reserving decision on whether there is similar protection for bidders or applicants for new government contracts who cannot rely on such a relationship. Appellants pleaded their case within the Umbehr framework and thus the district court principally adjudicated the case on that basis. Accordingly, the gravamen of the district court's opinion is that this case is distinguishable from Umbehr and O'Hare because appellants cannot claim the "status" of being in a "pre-existing commercial relationship with Southern Alleghenies."

The district court surely was correct in reaching this conclusion. In O'Hare the municipality had a list of tow truck operators which had included the plaintiff for many years. During a political campaign he declined to make a contribution to the incumbent mayor following which, allegedly in retaliation for that refusal, the municipality removed him from the list, thereby terminating a long term relationship. In Umbehr the plaintiff was a trash hauler who frequently criticized the county government which engaged him. Umbehr brought suit charging that the county terminated his contract in retaliation for his speech. In Umbehr, as in O'Hare, the retaliation terminated an active ongoing independent contractor relationship for the supplying of governmental services.

This case, however, is very different from Umbehr and O'Hare. Notwithstanding the appellants' pleading that they have had "an ongoing business relationship" with Southern Alleghenies since 1985, the facts which they have pled make it clear that the relationship is distinguishable from those in Umbehr and O'Hare. Here appellants had two prior contracts

with Southern Alleghenies for discrete services, the 1985 seatbelt project and the 1992 project coordinating the provision of promotional materials and advertising for the Olympic cycle trials. In addition, Cherryhill as a vendor supplied promotional materials to Southern Alleghenies.

Appellants do not allege that the contract for marketing services in connection with the TEAM PA Initiative involved here is related in any way to their prior contracts with Southern Alleghenies. Thus, their status differs from that of the plaintiffs in Umbehr and O'Hare who were providing ongoing services when the public entities terminated their relationship in retaliation for their political activities. We therefore conclude that with respect to the TEAM PA Initiative, this action does not "concern[ ] the termination of a pre-existing commercial relationship with the government." Umbehr, 518 U.S. at 685, 116 S. Ct. at 2352. Rather, this case involves a "suit[ ] by [a] bidder[ ] or applicant[ ] for [a] new government contract[ ] who cannot rely on such a relationship." Id.

Our analysis leads us to affirm the order of the district court for each of two independent reasons, one procedural and one substantive, either of which alone requires our result. The procedural reason is that appellants pled this case in the district court relying on their ongoing relationship with Southern Alleghenies and thus the viability of their claim depends on their ability to demonstrate that they had such a relationship. While we recognize that the appellants in their district court brief in opposition to appellees' motion to dismiss stated that if the court found that they did not have the same status as the plaintiffs in Umbehr and O'Hare, they nevertheless were entitled to First Amendment protection from retaliation, this argument went beyond the pleadings.

On this appeal appellants continue to focus on their previous relationship with Southern Alleghenies. Thus, they summarize their First Amendment argument as follows:

> Cherryhill and McClintock were regular providers of services to Southern Alleghenies and had an existing commercial relationship with Southern Alleghenies. As such Cherryhill and McClintock were entitled to protection from retaliation for exercise of their right to political expression. Thus, Southern Alleghenies' failure to award a contract to Cherryhill solely because Cherryhill and McClintock had worked for supported and worked for political opponents of Eichelberger states a claim for which relief can be granted. Accordingly, the district court erred in granting Southern Alleghenies' Motion to Dismiss the First Count of the First Amended Complaint.

Br. at 9.

In their brief in this court appellants once again contend that "even assuming that this Court finds that [they] do not have the same status as the plaintiffs in Umbehr and O'Hare, [they] are nonetheless entitled to protection, from government retaliation for exercise of their First Amendment rights." Br. at 15. We, however, will not entertain this argument as appellants did not plead it as the basis for relief in their complaint. See Krouse v. American Sterilizer Co., 126 F.3d 494, 499 n.1 (3d Cir. 1997). Accordingly, we will affirm the order of the district court for, as we already have indicated, the appellants do not have an ongoing relationship with

Southern Alleghenies entitled to First Amendment protection under Umbehr and O'Hare.

In any event, even if we entertained appellants' argument that without regard for their status under Umbehr and O'Hare they are entitled to relief, we would affirm. In reaching this result we understand that under Rutan certain applicants for public employment are entitled to First Amendment protection and that Umbehr indicated that "independent government contractors are similar in most relevant respects to government employees." 518 U.S. at 684, 116 S. Ct. at 2342. Nevertheless, the Court in Umbehr "emphasized the limited nature of [its] decision" and thus did "not address the possibility of suits by bidders or applicants for new government contracts who cannot rely on such a relationship." Id. at 685, 116 S. Ct. at 2342. The Court therefore carefully cabined its decision.

In Horn v. Kean, 796 F.2d 668, 678 (3d Cir. 1986) (in banc), we cautioned against extending First Amendment holdings if they would cause the judiciary to "intrude itself into such traditional practices as contract awards by the government's executive, be it on a federal, state or local level." Thus, we suggested that if expansion in the area is to come the source should be the Supreme Court. Id. While the substantive holding in Horn does not survive the later Supreme Court cases we have cited, still Horn's admonition remains true. Certainly it is difficult for a court to predict what the consequences would be on political activity if the First Amendment protections are extended beyond the Umbehr and O'Hare boundaries. Perhaps the extension even would discourage political activity.

On the other hand, retaliation in a situation involving ongoing contracts obviously presents a clear set of dynamics. Protection of an independent contractor with a pre-existing commercial relationship with the public entity from retaliation by reason of his political activity plainly protects his First Amendment rights. Accordingly, there is a principled reason to limit Umbehr and O'Hare to situations in which, unlike the one here, the retaliatory act is the termination of an ongoing commercial relationship.

The final issue before us involves appellants' state law supplemental claim. We see no reason to discuss this claim on the merits as we agree with the district court's dismissal of it and have nothing to add to its analysis. We, however, point out that the appellants do not contend that the district court abused its discretion in exercising jurisdiction over this claim. See 28 U.S.C. § 1367(c).

III. CONCLUSION

For the foregoing reasons, we will affirm the order of July 28, 1998.

DISSENT BY: ROTH

DISSENT:

Roth, Circuit Judge, Dissenting:

The majority's decision to affirm the dismissal of the appellants' statutory claim turns on two assumptions, both of which relate to McClintock's and Cherryhill's status as independent contractors. The first assumption critical to the outcome reached by the majority is its factual determination

that McClintock and Cherryhill did not have a "pre-existing commercial relationship" with Southern Alleghenies. Majority Op. at __, [typescript at 9-10]. The second is the majority's conclusion that, without such a pre-existing commercial relationship, the appellants cannot assert a claim under 42 U.S.C. § 1983 based on the appellees' failure to grant them a public contract for allegedly partisan reasons. Majority Op. at __, [typescript at 9]. For the reasons set forth below, I find that the Supreme Court's First Amendment jurisprudence does not support the kind of status-based limitation on individuals' rights of political expression and association that the majority's decision endorses.[1] Therefore, I respectfully dissent from the majority's decision to affirm the District Court's dismissal of the appellants' § 1983 claim.

The majority's understanding of the constitutional significance of the appellants' status as independent contractors rests primarily on language from Board of County Comm'rs v. Umbehr, 518 U.S. 668, 135 L. Ed. 2d 843, 116 S. Ct. 2342 (1996). This understanding arises from two sentences that appear in the penultimate paragraph of the opinion. The Supreme Court writes: "Finally we emphasize the limited nature of our decision today. Because Umbehr's suit concerns the termination of a pre-existing commercial relationship with the government, we need not address the possibility of suits by bidders or applicants for new government contracts who cannot rely on such a relationship." Id. at 685. The majority reads this language as categorically restricting claims by independent contractors, who allege that partisanship improperly influenced the awarding of a public contract, to those independent contractors who can demonstrate a business relationship with the government prior to the alleged unconstitutional incident.

The majority's reliance on this language regarding a "pre-existing commercial relationship" is misplaced. This language is dictum. More importantly, the majority's emphasis upon it diminishes the central proposition for which Umbehr stands: namely, the Court's "recognition [of] the right of independent contractors not to be terminated for exercising their First Amendment rights." Id. at 685; see also O'Hare Truck Serv. v. City of Northlake, 518 U.S. 712 at 723-26, 135 L. Ed. 2d 874, 116 S. Ct. 2353.

Moreover, the majority's emphasis on this language obscures the relevance of the many cases in which the Court has considered the First Amendment rights of government employees. E.g. Rutan v. Republican Party of Illinois, 497 U.S. 62, 111 L. Ed. 2d 52, 110 S. Ct. 2729 (1990); Branti v. Finkel, 445 U.S. 507, 63 L. Ed. 2d 574, 100 S. Ct. 1287 (1987); Mount Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977); Elrod v. Burns, 427 U.S. 347, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976); Perry v. Sindermann, 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972); Pickering v. Board of Educ., 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968); Keyishian v. Board of Regents, 385 U.S. 589, 17 L. Ed. 2d 629, 87 S. Ct. 675 (1967). In these cases, the Court made clear that the "unconstitutional conditions" doctrine extends to government employees. See Perry, 408 U.S. at 597 ("[The government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially his ... freedom of speech."); Rutan, 497 U.S. at 72-75 (holding that hiring, promotions, transfers, and recalls of low-level public employees based on partisan affiliation or association violate the First Amendment); Branti, 445 U.S. at 518 (holding that public defender could not discharge assistants because of their political affiliation without violating the First

Amendment); Elrod, 427 U.S. at 351 (holding that sheriff's discharge of non-civil service office staff because of their political affiliation violated the First Amendment). The only exception to this rule is when political affiliation is a reasonably appropriate requirement for the job in question. See e.g. Pickering, 391 U.S. at 568-74 (establishing fact-sensitive and deferentially administered balancing test for determining if government's interests are sufficiently compelling to overcome public employees' First Amendment rights).

None of these cases state, or reasonably should be taken to imply, that the ability of independent contractors to bring suit against governmental employers for violation of their First Amendment rights is categorically distinct from that of government employees. Rather, this precedent leads logically to the conclusion that independent contractors, like government employees, may not be disfavored by state actors in the employment process on grounds that offend the First Amendment. As best understood under the present state of the law, independent contractors enjoy essentially the same right to sue as do employees of the government who claim to have been denied employment for partisan reasons. Established in O'Hare, 518 U.S. at 723-26, and Umbehr, 518 U.S. at 674-76, the rule that independent contractors may not be discharged by government employers for exercising their First Amendment Rights evolved directly from the line of cases, cited supra, in which the Court considered the First Amendment rights of government employees. See e.g. Umbehr, 518 U.S. at 674-77 (discussing government employee cases); O'Hare, 518 U.S. at 718-21 (same).

In O'Hare and Umbehr the Court explained that it was extending the rule established in the government employee

cases to actions involving independent contractors because it found no difference of "constitutional magnitude" between these two categories of workers. See Umbehr, 518 U.S. at 679 (quoting Lefkowitz v. Turley, 414 U.S. 70, 83, 38 L. Ed. 2d 274, 94 S. Ct. 316 (1973); O'Hare, 518 U.S. at 722 (same). For the purpose of determining if the First Amendment restricts the freedom of governments to terminate their relationships with independent contractors, the Court found the similarities between government employees and government contractors "obvious"; moreover, it found the "threat of loss" the same to each in the event of governmental retaliation on grounds that violate their right to free expression. Umbehr, 518 U.S. at 674; accord O'Hare, 518 U.S. at 721-23. "Because of these similarities," the Court looked to the government employee precedents "for guidance," Umbehr, 518 U.S. at 674, and "applied ... the existing framework for government employees cases to independent contractors." Id. at 677.

To the extent that salient differences between these classes of workers exist in individual cases, the Umbehr Court found "no reason to believe that proper application of the Pickering balancing test cannot accommodate" them. Id. at 678. As a result, the Court rejected a brightline rule distinguishing the rights of independent contractors and employees because "whether state law labels a government service provider's contract as a contract of employment or a contract for services" is "at best a very poor proxy for the interests at stake." Umbehr, 518 U.S. at 679; see also O'Hare, 518 U.S. at 722 ("We can see no reason ... why the constitutional claim here should turn on the distinction [between independent contractors and employees], which is, in the main, a creature of the common law of agency and torts."). Because "such formal distinctions ... can be manipulated largely at the will

of the government," the Court rejected the idea of determining constitutional claims on the basis of them. Umbehr, 518 U.S. at at 679 (citing Logue v. United States, 412 U.S. 521, 532, 37 L. Ed. 2d 121, 93 S. Ct. 2215 (1973)). "Independent contractors, as well as public employees, are entitled to protest wrongful government interference with their rights of speech and association," the O'Hare Court stated. 518 U.S. at 723. Thus, contrary to the reasoning of the majority and the result it reaches in this case, the Court expressly has stated the view that independent contractors should be treated the same as employees of the government for purposes of First Amendment analysis.

Consequently, while it is true that the Court has not explicitly addressed the nature of independent contractors' right to sue on First Amendment grounds when they are considered applicants for new contracts, rather than as having pre-existing business relationships with the government, the inference to be drawn from Umbehr and O'Hare is clear. Given these holdings and the reasoning that the Court employed in reaching them, it is logical to conclude that all independent contractors fall within the standard set forth in Umbehr, in O'Hare, and in the government employee cases. The opposite inference, that this precedent should be understood to bar suits by contractors who are applicants for new contracts, is not logical.

The propriety of the inference that I suggest is inescapable in light of Rutan, 497 U.S. at 66-68, the case in which the Court considered whether hiring, promotions, transfers, and recalls based on government employees' political affiliation or support could be considered impermissible infringements on their First Amendment rights. The Court answered this question in the affirmative, id. at 74-77, thereby extending

the rule established in Branti, 445 U.S. at 518, and Elrod, 427 U.S. at 351, relating to politically motivated terminations. In so doing, the Court rejected the argument that hiring, promotions, transfers, and recalls were "different in kind" from the terminations involved in Elrod and Branti because, it reiterated, the law is clear that entitlement to employment is immaterial to a government employee's First Amendment claim. Rutan, 497 U.S. at 71-72 ("For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit ... on a basis that infringes his ... interest in freedom of speech.") (citing Perry, 408 U.S. at 596-98). In this way, the Court rejected the argument that an alleged impermissible infringement upon an employee's First Amendment right must occur in the form of a "substantial equivalent of dismissal." Id. 497 U.S. at 75. "There are deprivations less harsh than dismissal that nevertheless press state employees and applicants to conform their beliefs ... to some state-selected orthodoxy," the Court found. Id. (emphasis added). In my judgment, the fact that the Court expressly held that the same concerns that animated the rules in Elrod and Branti, regarding terminations, were present with respect to hiring in Rutan undermines the logic embraced by the majority. Id. at 78 ("Under our sustained precedent, conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so.").

Ultimately, it may be difficult for independent contractors like McClintock and Cherryhill to prove that the government violated their First Amendment rights during the employment

process. This is so because a public employee who makes such a claim bears the burden of demonstrating that the alleged violation was a motivating factor in his failure to attain a contract. See Mount Healthy, 429 U.S. at 283-87. This burden would appear more difficult to discharge in cases where a contractor has not had an on-going relationship with the government, prior to applying for a contract. This matter is, however, one to be resolved by the trial courts. The point here is that the government is not entitled per se to a denial of liability simply because an independent contractor, who makes such a claim, is bidding on a new contract. See Umbehr, 518 U.S. at 678.

Footnotes

[1] The majority also concludes that, before the District Court, appellants relied solely on the theory that they had an on-going relationship with Southern Alleghenies. Because, however, the District Court found that appellants were not regular providers of services and, therefore, not entitled to Elrod and Branti protection, I conclude that the issue, as I set it out above, is fairly before this Court.

Civil Action No. 97-297J

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JON McCLINTOCK and CHERRYHILL ASSOCIATES, INC.,
Plaintiffs,

v.

JOHN EICHELBERGER, JR., et al.,
Defendants.

July 28, 1998, Decided

COUNSEL: For JON MCCLINTOCK, CHERRYHILL ASSOCIATES, INC., plaintiffs: Daniel M. Berger, Berger Law Firm, Pittsburgh, PA.

For JOHN EICHELBERGER, JR., BRAD COBER, ALEXA FULTZ, ROBERT WILL, JOHN EBERSOLE, SOUTHERN ALLEGHENIES PLANNING AND DEVELOPMENT COMMISSION, defendants: Robert L. McTiernan, Tucker, Arensberg, Pittsburgh, PA.

JUDGES: D. Brooks Smith, United States District Judge.

OPINION BY: D. Brooks Smith

OPINION: MEMORANDUM and ORDER

D. BROOKS SMITH, District Judge

Jon McClintock is the principal stockholder of Cherryhill Associates, Inc., a corporation engaged in the business of marketing and advertising. In 1985, Cherryhill was retained by the Southern Alleghenies Planning and Development Commission ("SAPDC") to coordinate the promotion of the Commission's Seatbelt Safety Demonstration Project. SAPDC is a regional commission engaged in the development of business and industry in a six-county area located in the southern Allegheny Mountains of Pennsylvania. Cherryhill was retained again by SAPDC in 1992 to "coordinate providing promotional materials and advertising for the 1992 United States Olympic Cycle Trials." Dkt. no. 5, P 13. SAPDC "purchased various promotional materials" from Cherryhill during 1995, 1996 and 1997. Id. P 14.

Subsequently, Cherryhill was asked to "submit a proposal . . . to perform marketing services in connection with [SAPDC's] TEAM PA Initiative." Id. P 15. The TEAM PA Initiative was a coordinated effort between SAPDC and several regional industrial development corporations ("IDCs"). As a result, the marketing proposal submitted by Cherryhill, along with four other proposals, were reviewed by the IDCs, which unanimously recommended Cherryhill's marketing campaign to the finance committee of the SAPDC. The finance committee approved the recommendation to award the TEAM PA Initiative contract to Cherryhill.

On May 21, 1997, the executive board of the SAPDC considered the recommendation of the IDCs and the finance

committee. The executive board includes commissioners from each of the six counties within its region. Commissioner John Eichelberger, Jr. opposed awarding the marketing contract to Cherryhill because it "had supported and performed services for public officials and political candidates . . ." who had been his opponents in the past. Dkt. no. 5, P 20. Commissioners Brad Cober, Alexa Fultz, Robert Will and John Ebersole joined Commissioner Eichelberger in voting against the motion to award the contract to Cherryhill. The motion was defeated, and the contract was awarded to 2S Graphic Designs.

In a complaint filed November 7, 1997, McClintock and Cherryhill asserted under 42 U.S.C. § 1983 that SAPDC and Commissioners Eichelberger, Cober, Fultz, Will and Ebersole deprived them of their constitutional rights to political speech in violation of the First Amendment. SAPDC and the Commissioners moved to dismiss the complaint under Rule 12(b)(6), contending that plaintiffs failed to state a claim upon which relief could be granted because Cherryhill, as an independent contractor, had no existing business or contractual relationship with SAPDC.

Plaintiffs subsequently amended their complaint to allege that Cherryhill had maintained a business relationship with SAPDC since 1985 and that the denial of the TEAM PA marketing contract penalized McClintock and Cherryhill for "exercising their rights of free speech and assembly, as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States, by supporting and working for public officials and political candidates of their choice." Dkt. no. 5, P 26. A pendent claim against Commissioners Eichelberger, Cober, Fultz, Will and Ebersole asserted that

they were liable under state law for interfering with a prospective contractual relationship. Id. P 30.

SAPDC and the Commissioners moved to dismiss the amended complaint, contending that the protections of the First Amendment under the Umbehr and O'Hare line of cases, infra, do not extend to independent contractors like Cherryhill who are unsuccessful bidders on prospective government contracts. Dkt. no. 7. They also submit that the state law claim for interference with prospective contractual relations must fail because the commissioners cannot be liable for interfering with the award of a contract by a corporation which they themselves govern. Id. at 10.

A district court should refrain from granting a dismissal under Federal Rule of Civil Procedure 12(b)(6) unless the allegations in the complaint fail to state any claim upon which relief can be granted. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988). In determining whether the allegations in the complaint are sufficient to state a claim, the court must "accept as true the factual allegations . . . and all reasonable inferences that can be drawn from them. . . ." Id.

"The First Amendment [to the United States Constitution] protects political association as well as political expression." Buckley v. Valeo, 424 U.S. 1, 15, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976). In Elrod v. Burns, 427 U.S. 347, 349, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976), the Supreme Court recognized that a public employee who alleges that he was discharged or threatened with discharge solely because of his partisan political affiliation or nonaffiliation states a viable claim under § 1983 that his First Amendment rights have been violated. Subsequently, in Branti v. Finkel, 445 U.S. 507, 518, 63 L. Ed. 2d 574, 100 S. Ct. 1287 (1980), the Court

confirmed that the practice of patronage dismissals is unconstitutional, except for those positions in which a political affiliation "is an appropriate requirement for the effective performance of the public office involved." In such a case, the protections of the First Amendment must "yield to the State's vital interest in maintaining governmental effectiveness and efficiency." Id. at 517. The holdings in Elrod and Branti were extended in Rutan v. Republican Party, 497 U.S. 62, 75, 79, 111 L. Ed. 2d 52, 110 S. Ct. 2729 (1990), which "determined that promotions, transfers, . . . recalls after layoffs [and hiring] [of public employees] based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees."

A pair of decisions handed down by the Supreme Court two years ago extended the protections of Elrod and Branti to independent contractors. In Board of County Commissioners v. Umbehr, 518 U.S. 668, 135 L. Ed. 2d 843, 849, 116 S. Ct. 2342 (1996), the Court held that independent contractors are protected "from the termination of at-will government contracts in retaliation for their exercise of the freedom of speech." In a companion holding issued on the same day as Umbehr, the Court declared that Elrod and Branti protections "extend to an instance . . . where government retaliates against a contractor, or a regular provider of services, for the exercise of rights of political association or the expression of political allegiance." O'Hare Truck Services. Inc. v. City of Northlake, 518 U.S. 712, 135 L. Ed. 2d 874, 879, 116 S. Ct. 2353 (1996).

The plaintiff in Umbehr was a trash hauler whose exclusive contract with the county government for solid waste disposal was to be automatically renewed annually. He hauled trash

for six of the county's seven cities every year from 1985 to 1991. After Umbehr became an outspoken critic of the county board, and was an unsuccessful candidate to become one of its members, the board voted to terminate his contract. 518 U.S. at 671, 135 L. Ed. 2d at 849. In recognizing the right of an independent contractor not to be terminated for exercising his First Amendment rights, Justice O'Connor's majority opinion emphasized the "limited nature" of the decision:

> Because Umbehr's suit concerns the termination of a pre-existing commercial relationship with the government, we need not address the possibility of suits by bidders or applicants for new government contracts who cannot rely on such a relationship.

518 U.S. at 708, 135 L. Ed. 2d at 858.

The plaintiff in O'Hare provided towing services, and had, since 1965, been on a rotation list of available towing companies maintained by the city of Northlake. Tow requests received by city police were referred to the tow truck operator appearing next on the list. O'Hare's owner refused a request to make a political contribution to Northlake's mayor and displayed campaign posters for his opponent at its place of business. Shortly thereafter, O'Hare was removed from the rotation list, despite city policy which permitted removal only for cause. 518 U.S. at 715, 135 L. Ed. 2d at 877-878.

What is common to the plaintiffs in Umbehr and O'Hare is a "pre-existing commercial relationship." Umbehr had a government contract that was eventually terminated, while O'Hare was removed from an official list of contractors authorized to perform public services. In both instances, the

government entities had entered into commercial relationships with the plaintiffs which were on-going when the alleged retaliation took place. The plaintiffs in the instant case cannot lay claim to such status.

McClintock and Cherryhill argue that they are a "regular provider of services" and are therefore entitled to the same protections that Elrod and Branti afford any other independent contractor. Yet this argument finds no support in the language of Umbehr or O'Hare Service.

Despite the allegations in the complaint that McClintock and Cherryhill had performed various services in the past for SAPDC, they cannot claim to be a "regular provider of services" as that designation is used in O'Hare. O'Hare's inclusion among other tow truck operators on the rotation list maintained by the city of Northlake assured that it would receive regular towing business. Cherryhill had no such assurance in the instant case, and was merely submitting a proposal in the hope of being awarded a contract to perform future services. Cherryhill was no more than a bidder or applicant for a new government contract.

Furthermore, it would seem incoherent, if not inconsistent, for the Supreme Court to "emphasize" in its Umbehr decision that suits by bidders and applicants remain an open question while deciding in a companion case the same day that the door was now open to such claims.

It may well be that the Supreme Court, when provided with the appropriate case, will extend the Elrod-Branti-Rutan jurisprudence to the claims of disappointed bidders and applicants. Although I believe such an extension would be unwise,[1] that is the province of the Supreme Court and not of

judges of inferior courts. As a district judge, I am "obligated to apply the decisions rendered by higher courts, and not to expand or contract them. . . ." Lee v. Wojnaroski, 751 F. Supp. 58, 64 (W.D. Pa.1990). In declining to hold that a bidder having a prior contractual history with a municipal entity constitutes a "regular provider of services" entitled to Elrod and Branti protections, I follow the approach taken by the Third Circuit in Horn v. Kean, 796 F.2d 668, 679 (3d Cir.1986) (in banc) (overruled in Umbehr, 518 U.S. 668, 135 L. Ed. 2d at 850), in which that court reserved for the Supreme Court the question of whether to extend Elrod and Branti to independent contractors.

Not only is plaintiffs' constitutional claim not cognizable under existing law, his state law claim fails as well. "Essential to recovery on the theory of tortious interference with contract is the existence of three parties; a tortfeasor who intentionally interferes with a contract between the plaintiff and a third person." Maier v. Maretti, 448 Pa. Super. 276, 671 A.2d 701, 707 (Pa. Super. Ct. 1995). Defendant Eichelberger and his fellow executive board members, as the very decisionmakers who awarded the contract, cannot interfere with themselves. The fact that they are agents or officers of a corporate entity is of no legal significance. Daniel Adams Assoc. v. Rimbach Publishing, Inc., 360 Pa. Super. 72, 519 A.2d 997, 1000, 1002 (Pa. Super. Ct. 1987) (citing Restatement (Second) of Torts § 766).

Accordingly, for the above reasons, it is hereby ORDERED this 28th day of July, 1998, that the defendants' Motion to Dismiss the Amended Complaint, dkt. no. 6, is GRANTED. The Clerk of Court shall mark this case CLOSED.

BY THE COURT,

D. Brooks Smith

United States District Judge

Footnotes

[1] At the risk of making what some might consider a gratuitous observation, I ascribe to the views set forth in (now Chief) Judge Becker's eloquent concurrence in Carver v. Foerster, 102 F.3d 96 (3d Cir.1996). Like Chief Judge Becker, "I recognize that I am a judge of an inferior court, but that does not preclude me from expressing an opinion where I feel strongly that the Supreme Court has gone down a dangerous path it ought to reconsider." Id. at 106. In fact, I have previously felt "constrained to request reexamination of this troubled field by the appellate courts." Lee v. Wojnaroski, 751 F. Supp. 58, 64 (W.D. Pa.1990).

No. 98-3443

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JON MCCLINTOCK; CHERRYHILL ASSOC. INC.,
Appellants

v.

JOHN EICHELBERGER; BRAD COBER; ALEXA FULTZ;
ROBERT WILL; JOHN EBERSOLE; SOUTHERN
ALLEGHENIES PLANNING AND DEVELOPMENT
COMMISSION

April 27, 1999, Filed

On Appeal from the United States District Court for the
Western District of Pennsylvania (D.C. Civ. No. 97-00297)

SUR PETITION FOR REHEARING

BEFORE: BECKER, Chief Judge, and SLOVITER,
STAPLETON, MANSMANN, GREENBERG, SCIRICA,
NYGAARD, ALITO, ROTH, LEWIS, MCKEE, RENDELL,
AND Lourie, * Circuit Judges

The petition for rehearing filed by the appellants, Jon McClintock and Cherryhill Associates, Inc., in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service

not having voted for rehearing by the court en banc, the petition for rehearing is denied. Judge Lourie's vote is limited to denying rehearing before the original panel.

BY THE COURT:

s/Circuit Judge

Footnotes

*Honorable Alan D. Lourie, Circuit Judge of the United States Court of Appeals for the Federal Circuit sitting by designation.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No.: 97-297J

JON McCLINTOCK and
CHERRYHILL ASSOCIATES, INC.,

Plaintiffs,

v.

JOHN EICHELBERGER, JR.; BRAD COBER; ALEXA FULTZ; ROBERT WILL; JOHN EBERSOLE; and SOUTHERN ALLEGHENIES PLANNING AND DEVELOPMENT COMMISSION,

JURY TRIAL DEMANDED.

Defendants.

FIRST AMENDED COMPLAINT

JURISDICTION

1. This action is brought pursuant to 42 U.S.C. §1983 and the First and Fourteenth Amendments to the United States Constitution, and the common law of Pennsylvania. Jurisdiction is founded upon 28 U.S.C. §1331 and 1343(a)(3) and (4), and the aforementioned statutory and constitutional provisions and pendent state jurisdiction.

Plaintiffs' federal causes of action are based on 42 U.S.C. §1983 and the First and Fourteenth Amendments.

PARTIES

2. Jon McClintock, Plaintiff herein, is a resident of Blair County, Commonwealth of Pennsylvania. At all times relevant to the matters set forth in this Complaint, Plaintiff was engaged in the business of marketing and advertising and was the principal stockholder of Plaintiff Cherryhill Associates, Inc.

3. Cherryhill Associates, Inc., Plaintiff herein (hereafter "Cherryhill"), is a corporation chartered and existing under the laws of the Commonwealth of Pennsylvania with a principal place of business in Blair County. At all times relevant to the matters set forth in this Complaint, this Plaintiff, through its officers and employees, engaged in the business of marketing and advertising.

4. John Eichelberger, Defendant herein, is a resident of Blair County, Commonwealth of Pennsylvania. At all times relevant to the matters set forth in this Complaint, this Defendant was a Commissioner of Blair County and as such was a member of the Executive Board of Defendant Southern Alleghenies Planning and Development Commission (hereafter "Southern Alleghenies").

5. Brad Cober, Defendant herein, is a resident of Somerset County, Commonwealth of Pennsylvania. At all times relevant to the matters set forth in this Complaint, this Defendant was a Commissioner of Somerset County and as such was a member of the Executive Board of Defendant Southern Alleghenies.

6. Alexa Fultz, Defendant herein, is a resident of Huntingdon County, Commonwealth of Pennsylvania. At all times relevant to the matters set forth in this Complaint, this Defendant was a Commissioner of Huntingdon County and

as such was a member of the Executive Board of Defendant Southern Alleghenies.

7. Robert Will, Defendant herein, is a resident of Somerset County, Commonwealth of Pennsylvania. At all times relevant to the matters set forth in this Complaint, this Defendant was a Commissioner of Somerset County and as such was a member of the Executive Board of Defendant Southern Alleghenies.

8. John Ebersole, Defendant herein, is a resident of Blair County, Commonwealth of Pennsylvania. At all times relevant to the matters set forth in this Complaint, this Defendant was a Commissioner of Blair County and as such was a member of the Executive Board of Defendant Southern Alleghenies.

9. Southern Alleghenies Planning and Development Commission, Defendant herein, is a corporation or other entity existing under the laws of the Commonwealth of Pennsylvania with a principal place of business in Blair County. At all times relevant to the matters set forth in this Complaint, this Defendant was engaged in developing the business and industry of the Counties of Bedford, Blair, Cambria, Somerset, Huntingdon and Fulton.

10. By reason of the fact that the individual Defendants were Commissioners of various Counties in the Commonwealth of Pennsylvania and by reason of the fact that Defendant Southern Alleghenies was governed by the individual Defendants and other County Commissioners and was funded by local, state and/or federal appropriations, the actions of each of the Defendants described hereafter were actions under the color of state law.

FACTS

11. Beginning in 1985, Plaintiffs McClintock and Cherryhill have developed an ongoing business relationship

with Defendant Southern Alleghenies as independent contractors.

12. In 1985, Plaintiff McClintock was retained by Defendant Southern Alleghenies to coordinate the promotion of Defendant's "Seatbelt Safety Demonstration Project". Plaintiff McClintock performed his services to the satisfaction of Defendant Southern Alleghenies.

13. In 1992, Plaintiff Cherryhill was retained by Defendant Southern Alleghenies to coordinate providing promotional materials and advertising for the 1992 United States Olympic Cycle Trials which was coordinated by Defendant Southern Alleghenies. Plaintiff Cherryhill performed its services to the satisfaction of Defendant Southern Alleghenies.

14. In the years of 1995, 1996 and 1997, Defendant Southern Alleghenies purchased various promotional materials from Plaintiff Cherryhill such as magnets, vinyl banner and bags and specially imprinted "Slinkies."

15. Because of this long ongoing relationship Plaintiff Cherryhill was requested by Defendant Southern Alleghenies to submit a proposal for Plaintiff Cherryhill to perform marketing services in connection with Defendant Southern Alleghenies' TEAM PA Initiative. The marketing campaign proposed by Plaintiff Cherryhill was designed to make companies in the six county area aware of a survey process being conducted prior to interviewers contacting businesses to set up interview dates. The proposal by Plaintiff Cherryhill provided for payment to Cherryhill by Defendant Southern Alleghenies for the services to be performed under the marketing contract.

16. Because the TEAM PA Initiative was a coordinated effort between Defendant Southern Alleghenies and Industrial Development Corporations, the Industrial

Development Corporations undertook the review of Plaintiff Cherryhill's marketing proposal as well as proposals from four other firms. As a result of the foregoing, Plaintiff Cherryhill and one other firm were selected for interviews.

17. Following the interview of Plaintiff Cherryhill and the other marketing firm, the Industrial Development Corporations unanimously agreed to award the marketing contract to Plaintiff Cherryhill.

18. On May 21, 1997, the marketing proposal of Plaintiff Cherryhill, together with the unanimous recommendation of the Industrial Development Corporations acting as the TEAM PA Advisory Committee, was presented to the Finance Committee of Defendant Southern Alleghenies for approval, and on said date the said Finance Committee, upon motion made and seconded, approved the recommendation to award the marketing contract to Plaintiff Cherryhill.

19. Thereafter, also on May 21, 1997, the marketing contract approved by both the Industrial Development Corporations acting as the TEAM PA Advisory Committee and Defendant Southern Alleghenies own Finance Committee was presented to the Executive Board of Defendant Southern Alleghenies for final approval.

20. Upon presentation of the marketing contract to the Executive Board Defendant Eichelberger stated his opposition to awarding the contract to Plaintiff Cherryhill because Plaintiffs had supported and performed services for public officials and political candidates who were opposed by Defendant Eichelberger. Thereupon, Defendants Cober, Fultz, Will and Ebersole agreed with Defendant Eichelberger. As a result, when a motion was made to award the contract to Plaintiff Cherryhill, it was defeated upon the votes of Defendants Eichelberger, Cober, Fultz, Will and Ebersole, constituting a majority of the Executive Board. A motion

was then made by Defendant Cober to award the marketing contract to 2S Graphic Designs and this motion was adopted by the votes of Defendants Eichelberger, Cober, Fultz, Will and Ebersole, and the contract was, in fact, awarded to 2S Graphic Designs.

21. The reason that Defendants did not award the marketing contract to Plaintiff Cherryhill was because Plaintiffs McClintock and Cherryhill, in the exercise of their rights under the First and Fourteenth Amendments, had supported and performed services for various public officials and political candidates who were opposed by Defendant Eichelberger and some or all of the other individual Defendants, or, in the alternative, Defendant Eichelberger opposed said public officials and political candidates and the other individual Defendants supported Defendant Eichelberger in denying the marketing contract to Plaintiff Cherryhill, with said other individual Defendants knowing that Defendant Eichelberger's opposition was based upon Plaintiffs' support of said public officials and political candidates.

22. By reason of Plaintiffs' long, ongoing and satisfactory business relationship with Defendant Southern Alleghenies, and by reason of the approval of the marketing contract by the Industrial Development Corporations, acting as the TEAM PA Advisory Committee, and by reason of the approval of the marketing contract by Defendant Southern Alleghenies own Finance Committee, Plaintiffs had the expectation that the marketing contract would be awarded to Plaintiff Cherryhill based upon the contracting procedures of Defendant Southern Alleghenies as well as the procedures of the Appalachian Regional Commission which oversees the actions of Defendant Southern Alleghenies.

23. At all times relevant to the foregoing, the individual Defendants were acting as the agents, servants and/or employees of Defendant Southern Alleghenies.

24. At all times relevant to the foregoing, each of the individual Defendants was acting as the agent, servant and/or employee of each of the other individual Defendants.

CAUSES OF ACTION

FIRST COUNT

25. Plaintiffs incorporate by reference and make a part of this Count all of the allegations of paragraphs 1 through 24 aforesaid.

26. The denial to Plaintiff Cherryhill of the marketing contract constituted the intentional, willful, malicious and outrageous conduct of Defendants, acting under color of state law, in penalizing Plaintiffs for exercising their rights of free speech and assembly, as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States, by supporting and working for public officials and political candidates of their choice.

SECOND COUNT

27. Plaintiffs incorporate by reference and make a part of this Count all of the allegations of paragraphs 1 through 26 aforesaid.

28. Defendant Eichelberger, in opposing Plaintiff Cherryhill being awarded the marketing contract, did so with actual malice toward both Plaintiffs McClintock and Cherryhill because of Plaintiffs having worked for and supported political opponents of Defendant Eichelberger.

29. The actions of Defendants Eichelberger, Cober, Fultz, Will, and Ebersole in opposing Plaintiff Cherryhill being awarded the marketing contract on the basis that Cherryhill had worked for and supported political

opponents of Defendant Eichelberger were actions that were against the interest of Defendant Southern Alleghenies.

30. Defendants Eichelberger, Cober, Fultz, Will and Ebersole, by denying the marketing contract to Plaintiff Cherryhill, interfered with the advantageous relationship between Plaintiff Cherryhill and Defendant Southern Alleghenies.

DAMAGES

31. As a result of the conduct of Defendants as described in the First Count, Plaintiff McClintock has suffered the following injuries and damages:

a. Injury to reputation;
b. Emotional distress;
c. Impairment of earning capacity; and
d. Embarrassment and humiliation.

32. As a result of the conduct of Defendants as described in the First and Second Counts, Plaintiff Cherryhill has suffered the following injuries and damages:

a. Loss of income from the marketing contract;
b. Injury to reputation; and
c. Impairment of earning capacity.

33. By reason of the intentional, willful, malicious and outrageous conduct of Defendants, Plaintiffs are entitled to an award of punitive damages against all Defendants.

RELIEF CLAIMED

WHEREFORE, Plaintiffs claim the following relief:

A. Compensatory and punitive damages for Plaintiffs McClintock and Cherryhill pursuant to the allegations of the First Count, in sums in excess of $75,000 for each Plaintiff;

B. Compensatory and punitive damages for Plaintiff Cherryhill against all Defendants pursuant to the allegations of the Second Count, in a sum in excess of $75,000;

C. Attorneys fees;

D. Costs and expenses of this action; and

E. Any and all other relief appropriate under the circumstances.

TRIAL BY JURY IS DEMANDED.

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No. 99-168

In The

Supreme Court of the United States

JOHN McCLINTOCK and
CHERRYHILL ASSOCIATES, INC.,

Petitioners,

v.

JOHN EICHELBERGER, JR.; BRAD COBER;
ALEXA FULTZ; ROBERT WILL; JOHN EBERSOLE;
and SOUTHERN ALLEGHENIES PLANNING
AND DEVELOPMENT COMMISSION,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I. STATEMENT OF THE CASE

Petitioners, Jon McClintock ("McClintock") and Cherryhill Assoc. Inc. ("Cherryhill") seek to overturn the decision of the United States Court of Appeals for the Third Circuit, which affirmed a grant of a motion to dismiss by the United States District Court for the Western District of Pennsylvania in favor of the Respondents, John Eichelberger, Jr., Brad Cober, Alexa Fultz, Robert Will, John Ebersole and Southern Alleghenies Planning and Development Commission (the "Commission").

The Court of Appeals correctly applied the principles set forth in two recent decisions of the United States Supreme Court, which created a cause of action for independent contractors whose long term contractual arrangements with a municipal government were terminated in retaliation for activity protected by the First Amendment of the United States Constitution. The Court of Appeals held that these cases had no application to a situation involving a new contract in which none of the bidders had any on-going contract with the public entity.

The Court of Appeals also correctly held that the claim set forth in this Petition by McClintock and Cherryhill – that all contractors are entitled to First Amendment protection, even when bidding on a new contract – was not properly raised by the Petitioners in their Amended Complaint.

II. STATEMENT OF FACTS

The Commission was formed to promote economic development in six Pennsylvania counties. The individual

Respondents are members of the Commission's Executive Board.

In 1997, the Commission sought proposals to perform marketing services in connection with a new economic development program, the TEAM PA Initiative. The purpose of the proposed marketing program was to familiarize local business leaders with the new program before the Commission's staff began a series of interviews with business leaders concerning economic development issues. None of the consultants submitting proposals for this contract had ever performed this marketing service for the Commission.

McClintock and Cherryhill had provided some services to the Commission in the past, but had no existing agreement to provide marketing services of any kind to the Commission at the time the proposals were submitted. McClintock and Cherryhill had a contract in 1985, a dozen years before TEAM PA, to provide seat belt safety education and a 1992 arrangement to provide materials related to the Olympics. Since that time, they have served solely as a vendor, selling magnets, vinyl banners, bags and Slinkys to the Commission.

On May 21, 1997, the Executive Board of the Commission, the body with the authority to enter into contracts, rejected the bid submitted by McClintock and Cherryhill and awarded the marketing contract to another bidder, 2S Graphic Designs.

III. REASONS FOR DENYING THE WRIT

A. The United States Supreme Court has provided clear guidance on the issues raised, which were followed by the Court of Appeals for the Third Circuit.

During the last twenty years, this Court has outlined protections that are available to public employees under the First and Fourteenth Amendments. *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990); *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976). This Court, however, has been cautious and restrained in extending such protections to independent contractors seeking contractual relations with entities acting under color of state law.

Two recent decisions of this Court extend the protections of the First Amendment to independent contractors in cases where their contracts with public entities have been terminated in retaliation for their exercise of protected speech. *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr*, 518 U.S. 668 (1996) and *O'Hare Truck Services, Inc. v. City of Northlake*, 518 U.S. 712 (1996).

In *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr*, the Court held that the First Amendment protected a contractor from termination or prevention of automatic renewal of his government contract in retaliation for his exercise of free speech. In that case, the contractor, Umbehr, had provided trash hauling services to the defendant for nearly ten years. In 1990, the board of county commissioners terminated his contract, allegedly in retaliation for his outspoken criticism of the commissioners.

Similarly, *O'Hare Truck Services, Inc. v. City of Northlake*, was commenced by a tow truck operator who had served the City of Northlake for nearly thirty years. O'Hare commenced suit after it was removed from the rotation list of tow truck operators providing services to the City, allegedly for refusing to make contributions to the mayor's election campaign and openly supporting the mayor's opponent.

The Court held in both cases that, under the facts alleged, it was improper to *terminate* an independent contractor's *existing* contractual relationship with a municipal body in retaliation for the exercise of First Amendment rights. There is a significant difference between these cases and the facts alleged by the Petitioners, McClintock and Cherryhill.

In each of the cases discussed above, the aggrieved contractor had been providing on-going services to the municipal entity for many years and was *terminated* for allegedly unconstitutional reasons. In *Umbehr*, the contractor had been providing trash hauling services since 1981, and was not terminated until 1991, after a continuing ten year relationship. In *O'Hare*, the contractor had been on the tow truck operator rotation list since 1965, nearly thirty years, prior to its removal.

This Court limited its decision to the facts presented, specifically, to the *termination of existing contractual relationships* and excluded independent contractors bidding on new contracts.

The Court noted in *Umbehr*:

> Finally, we emphasis the limited nature of our decision today. Because Umbehr's suit concerns the termination of a pre-existing commercial relationship with the government, we need not address the possibility of suits by bidders or applicants for *new government contracts* who cannot rely on such a relationship.

Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr, 518 U.S. at 685 (emphasis added).

In emphasizing the limited nature of the decision, the Court was responding to explicit concerns that wholesale incorporation of independent contractors seeking new contracts into the previous line of cases governing public employees was not warranted and would imprudently expand the scope of potential litigation before the Court. The Court carefully balanced the need to protect the independent contractor's reliance on existing, long-term contracts – an interest which closely mirrors the employment relationship – with one wholesale federalizing of the public bidding process for new contracts.

An acceptance of Petitioners' claim to First Amendment protection would have consequences for public bidding far beyond those intended by this Court. Instead of providing protection to contractors who have already been selected to provide services and who, presumably, have been providing services in adequate fashion, Petitioners' theory would provide a basis for suit in federal court by any dissatisfied bidder who wishes to sell a completely new type of goods or provide a wholly new

service to a public body.[1] Whenever a municipality, school district, municipal authority or other political subdivision requests proposals for any type of goods or services, the governing body could be forced to litigate its reasons for rejecting nearly every single bidder submitting a proposal.

Petitioners' theory would expand the application of First Amendment principles far beyond the boundaries permitted by this Court's prior decisions affecting independent contractors. It would lead to a risk of litigation and inefficiencies far beyond those envisioned by the Court in its previous decisions.

It is respectfully suggested that it is inappropriate to upset the delicate balance established by this Court by a wholesale expansion of the principles set forth in *Umbehr* and *O'Hare* to any potential, unsuccessful bidder for a completely new product or service.

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[1] Petitioners argue the injustice of extending First Amendment protection to Contractor A, who has a contract for trash collection, while denying it to Contractor B, who is trying to obtain the same contract. This hypothetical situation, however, has no application to the case before the Court because Petitioners, McClintock and Cherryhill, were not bidding to replace an existing consultant on the TEAM PA project. Indeed, none of the bidders had provided this service to the Commission in the past, because it involved a completely new project. The actual facts of this case would be a poor basis for resolving Petitioners' hypothetical example.

B. The Petition does not satisfy the criteria set forth in Rule 10 setting forth Considerations Governing Review on Certiorari.

The Petition in this case does not meet the criteria set forth in Rule 10 for a case appropriate for review by this Court.

As noted above, this Court has recently provided guidance to lower courts on the application of First Amendment principles to independent contractors. In doing so, the Court did not determine that independent contractors should be treated as interchangeable with public employees. Rather, after a careful balancing of interests and considerations, the Court extended First Amendment protection to those independent contractors whose circumstances most closely resemble the situation of public employees – i.e., contractors with an on-going, long-term contractual arrangement that has been terminated.

There is no conflict between the decisions of various courts of appeals on this issue. To the contrary, research indicates that the decision of the Court of Appeals for the Third Circuit in this case is the sole decision of a federal appellate court which has dealt with the questions raised. In fact, the lower courts have had extremely limited opportunity to apply the principles outlined by the Court in the *Umbehr* and *O'Hare* decisions. This makes it a singularly inappropriate case to reopen and reconsider the meaning of this Court's recent decisions in *Umbehr* and *O'Hare*.

C. The issues raised by the Petition were not raised in the Court below.

The primary issue allegedly raised by the Petition, whether an individual or company can be denied a new government contract that has never been awarded in the past, in retaliation for the exercise of First Amendment rights, was not raised by the Petitioners in their pleadings below. As noted in the Court of Appeals' opinion, the Amended Complaint in this case was framed solely in terms of a termination of an existing contractual relationship in violation of the First Amendment. The Court of Appeals noted that the Petitioners "pled this case in the district court relying on their on-going relationship with Southern Alleghenies and thus the viability of their claim depends on their ability to demonstrate that they had such a relationship." (Petition, p. 10a). The Court went on to determine that the on-going relationship alleged by the Petitioners was not the type of contractual arrangement protected by the principles outlined in this Court's decisions in *Umbehr* and *O'Hare*.

Now, the Petitioners attempt to reframe their case as a claim for First Amendment protection for all bidders on public contracts, regardless of whether they have had a previous relationship with the governmental body. This issue cannot be placed before this Court, because it was not appropriately pled and raised in the District Court.

IV. CONCLUSION

This Court has provided clear guidance on the issue of First Amendment protection for independent contractors whose business arrangements are terminated in retaliation for their exercise of First Amendment rights. There is no conflict between the courts of appeals with respect to the application of those principles. In fact, the lower courts have had limited opportunity develop and apply the guidance already provided by this Court. Moreover, the issue raised in the Petition was not properly raised by Petitioners in their pleadings below and, therefore, it is not an appropriate issue to be considered by this Court. For these reasons, it is respectfully requested that the Petition be denied.

Respectfully submitted,

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